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No. 72-1498

In the
Supreme Court of the United States
OCTOBER TERM, 1972

WAVERLY THOMPSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Petitioner respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on March 8, 1973, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding the petitioner guilty of violating Sections 2, 371 and 2314, Title 18, United States Code. Petitioner was sentenced to the custody of the Attorney General of the United States for a period of five years.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Northern District of Illinois was entered on December 14, 1971, without opinion and is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the District Court was filed on March 8, 1973, No. 72-1138, and is not yet reported, but is set forth in the Appendix.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on March 8, 1973, and a timely petition for a rehearing was denied on April 9, 1973. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Did the trial court fail to instruct the jury as to all of the essential elements of the conspiracy charged in the indictment?
2. Was knowledge that the securities were to be transported into interstate commerce an essential element of the charged conspiracy?
3. Where the petitioner was charged as an aider and abettor, was it error to instruct the jury that the co-defendants, including the one charged as a principal, were his accomplices as a matter of law?
4. Was the petitioner penalized for exercising his constitutional right to a trial by jury?
5. Did the petitioner's sentence constitute cruel and unusual punishment in view of the fact that his co-defendants were placed on probation?

STATUTES INVOLVED

Title 18, United States Code, Section 2 (a).

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Title 18, United States Code, Section 2314.

> "Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited;"

Amendment VI. United States Constitution.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

Amendment VIII. United States Constitution.

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

The petitioner and three others were charged in an eight count indictment (A. 1).[1] Count One of the indictment charged the petitioner along with co-defendants, Dayo Nagel, George Wright and Ionia Coleman with having conspired to transport forged securities in interstate commerce in violation of Title 18, United States Code, Sec-

[1] All record references are to the documents filed in the United States Court of Appeals for the Seventh Circuit. "A" refers to petitioner's Appendix filed in that court. "Tr" refers to the transcript of the trial court proceedings. "T.S." refers to the supplemental transcript of the sentencing hearing held on December 14, 1971.

tion 371. Counts Two through Eight charged the defendant, Nagel, with substantive violations of Title 18, United States Code, Section 2314 and charged the petitioner and the other defendants with having aided and abetted Nagel in committing the substantive offenses in violation of Title 18, United States Code, Sections 2 and 2314.

Only the petitioner elected to stand trial, and on November 10, 1971, he was found guilty by a jury on all counts of the indictment and on December 14, 1971, he was sentenced to the custody of the Attorney General of the United States for a period of five years on each of the counts, with the sentences to run concurrently to each other (A. 12).

Prior to trial the defendant Nagel entered a plea of nolo contendre to Count I of the indictment and the remaining seven counts were dismissed as to him, while the other two defendants entered pleas of guilty to all counts of the indictment pertaining to them.

The defendant Nagel was placed on probation for a period of three years (T.S. 8); the defendant Wright was placed on probation for a period of three years, notwithstanding the fact that he had two prior felony convictions for burglary (T.S. 11-12); and the defendant Coleman was placed on probation for a period of three years (T.S. 4).

The Government's case against the petitioner consisted primarily of the testimony of the three co-defendants, Dayo Nagel, Ionia Coleman and George Wright, all of whom had entered pleas to the indictment prior to the trial but had not as yet been sentenced.

Mrs. Coleman testified that during late September or early October, 1970, she told her brother, George Wright, that it would be very easy for her to steal some checks from her employer, Apex Smelting Co. (A. 14), and that since her job also entailed the reconciliation of the bank statement, she could cover up the thefts (A. 15). Thereafter, after being advised by her brother that he had made contact with the petitioner, she stole eight Apex checks and copies of signatures of persons who were authorized to sign the checks.

The defendant Wright testified that the petitioner told him that he had an outlet for disposing of "paper" if Wright could get some checks (A. 21). Wright testified that the petitioner told him that his source was up north; and it was agreed that the source would get one-half of the proceeds, Mrs. Coleman would get one-fourth and Wright and the petitioner would split the remainder of the proceeds.

When Wright obtained the first check from his sister, he stated that he went over to the petitioner's house, and at the petitioner's direction, he made the check out for $20,000, payable to Nagel's Grain and Seed Company, Bismarck, North Dakota, and he also forged the signatures on the check (A. 22). The petitioner then drove him to the main Post Office where Wright mailed the check to Nagel.

Wright testified that he got seven other checks from his sister, Mrs. Coleman, which he filled out in various amounts from $20,000 and up which were made payable to Nagel's Grain and Seed Company which he gave to the petitioner (A. 23). Wright testified that he did not know what the petitioner did with these other checks.

After receiving word that the first $20,000 check had cleared, Wright testified that at the petitioner's direction he drove to Bismarck, North Dakota, where he picked up $10,000 in cash from the defendant Nagel (A. 24).

Upon returning to Chicago, Wright gave the petitioner about $1,300 and split the rest of the money with his sister (A. 25). According to Wright, the petitioner was dissatisfied with his share, and after Wright gave him the other checks, the petitioner told him that he (the petitioner) would notify him when the money came back from these checks.

Mrs. Coleman was pulled off her job during the first part of January, 1971 and could no longer cover for the stolen checks (A. 26). The petitioner told Wright that it was too late to stop the other checks and a few days later Nagel was arrested in Bismarck (A. 27).

Nagel came to Chicago and told Wright that he wanted the $27,000 to $29,000 back that he had sent to Chicago (A. 28) in order to put it back into his account so that the problem could be solved (A 29).

The defendant Nagel testified that he first met the petitioner when he was trying to raise money for his feed company (A. 31). He said that on or about December 10, 1970, he received a telephone call from the petitioner who stated that he was sending him a check for $20,000 and that he wanted $10,000 of this amount back (A. 32). On December 16, 1970, he received a $20,000 Apex check made payable to his grain company.

When this check cleared his account at the Dakota National Bank in Bismarck, North Dakota, he gave Wright $10,000 in cash from this account (A. 34). On December 21, 1970, Nagel sent the petitioner a check for $2,500

(A. 35) as a gift (A. 42). On or about December 22, 1970, he received another Apex check for $25,000 which he deposited in his company account (A. 35). He stated that when the petitioner asked him if he would be satisfied with one-third of this amount, he agreed.

Nagel testified that he then withdrew $17,000 from this account and gave $16,700 to the petitioner at the Conrad Hilton Hotel, Chicago, Illinois (A. 36). At this time the petitioner dropped an envelope into his brief case which contained five more Apex checks varying in amounts from $16,000 to $25,000. The checks for $25,000 and $18,000 were deposited into Nagel's company account at the Dakota National Bank. Three other checks totaling $60,639 were deposited in the Nagel Grain and Seed Company account at the Farmer's and Merchant's Bank in Cheyenne, North Dakota (A. 37).

Nagel was arrested on January 11, 1971, in North Dakota for "intent to defraud the Dakota National Bank" (A. 38). After being released on bond he came to Chicago and met with Wright and the petitioner in an effort to get the money back.

The petitioner did not testify at the trial in his own behalf.

REASONS FOR GRANTING THE WRIT

1. THE TRIAL COURT FAILED TO INSTRUCT THE JURY AS TO ALL OF THE ESSENTIAL ELEMENTS OF THE CONSPIRACY CHARGED IN THE INDICTMENT. KNOWLEDGE THAT THE SECURITIES WERE TO BE TRANSPORTED INTO INTERSTATE COMMERCE WAS AN ESSENTIAL ELEMENT OF THE CHARGED CONSPIRACY.

The opinion of the court below to the effect that knowledge that the securities were to be transported into interstate commerce was not an essential element of the conspiracy count is in conflict with several decisions of the Second Circuit. In its instructions to the jury relative to Count One of the indictment, the court merely instructed the jury as follows:

> "Count 1 of indictment No. 71 CR 509 charges the crime of conspiracy to commit the offense of transporting into interstate commerce falsely made and forged securities, knowing the securities to have been falsely made and forged.
>
> "To convict the defendant Waverly Thompson of this offense, the government must prove beyond a reasonable doubt the existence of a conspiracy to commit the offense of transporting into interstate commerce falsely made and forged securities, knowing the securities to have been falsely made and forged." (A. 56).

From this instruction it is apparent that the trial judge informed the jury that it was necessary only that knowledge that the securities had been falsely made and forged need be proved and it was not necessary for the government to also prove knowledge on the part of the petitioner that the securities were to be transported in interstate commerce.

The most recent case from the Second Circuit is that of *United States* v. *Fields*, (2nd Cir. 1972) 466 F. 2d 119, wherein the court stated:

> "Similarly, in explaining the conspiracy count the judge told the jury that the charge was that defendants had conspired to 'take this property' whereas the indictment charged conspiracy to 'receive and possess' the stolen goods. *In addition, the court did not explain the additional degree of knowledge required for a conviction of conspiracy to violate section 659, i.e., that the Government must prove not only the defendants knew the goods were stolen but also that they knew the goods were stolen from interstate commerce.* See *United States* v. *Vilhotti*, 452 F. 2d 1186, 1189-90 (2d Cir. 1971) and cases there cited.
>
> "The Government makes a manful effort to minimize the effect of these errors but its only argument of any merit is that none of the errors was called to the attention of the trial judge by defense counsel. This is, incredibly, accurate. Nonetheless, we think that the cumulative effect of the errors in the charge was, in the words of Fed. R. Crim. P. 52, 'plain' that it affected 'substantial rights' of defendants on all counts and should 'be noticed' although not raised below. *United States* v. *Vaughan*, 443 F. 2d 92, 94-95 (2d Cir. 1971). *We regret the need for a new trial because the evidence of the guilt of these defendants was substantial, but we do not see how we can fairly follow any other course. This is not, after all, a case of nit-picking over nuances in a judge's charge; the errors go directly to a defendant's right to have the jury told what crimes he is actually being tried for and what the essential elements of those crimes are.*" (Emphasis added) 466 F. 2d at Pages 120-121.

In the case of *United States* v. *Giuliano*, (2d Cir. 1965) 348 F. 2d 217, wherein one of the counts of the indict-

ment charged the defendants with conspiracy to transport stolen bonds from New York to Florida, the court stated:

> "As Judge Pamieri pointed out in his instructions, *knowledge of the interstate or foreign transportation was required for conviction on the conspiracy count,* but such knowledge was not an element of the substantive offense and hence need not be found in order to convict on the substantive count." (Emphasis Added) 348 F. 2d at Page 221.

In another recent case, *United States* v. *Vilhotti,* (2d Cir. 1971) 452 F. 2d 1186, 1189, the Second Circuit held that it was error for the trial judge to refuse to charge the jury that in order to convict for conspiracy they would have to find that the defendants not only knowingly bought, received or possessed goods which were stolen, but also that *the defendants knew that they were stolen from interstate commerce.*

The cases from the Seventh Circuit relied upon by the court below are not applicable for the reason that in those cases, the defendants did not contest the adequacy of the court's jury instructions but only whether or not the evidence was sufficient to establish the requisite knowledge of the use of interstate facilities.

Reliance by the court below on the Ninth Circuit case of *United States* v. *Roselli,* (9th Cir. 1970) 432 F. 2d 879, 890-92, cert. den. 1971, 401 U.S. 924, is also misplaced. According to the court's opinion on page 892 of the *Roselli* case, the trial judge *did* instruct the jury pertaining to the element of knowledge of the use of interstate facilities necessary for a conviction on the conspiracy count. On Page 892 of the *Roselli* case, the court stated:

"In the second place, as we have said, Teitelbaum's conviction of conspiracy was proper even if knowledge of the interstate aspects of the illegal scheme is an essential element of the offense.

"In Twitchell v. United States, 313 F. 2d 425 (9th Cir. 1963), we construed the Mann Act, 18 U.S.C. §§ 2421-2422, as requiring knowledge of the illegal transportation of females in interstate commerce for immoral purposes. We held however, that possession of the requisite knowledge by one charged with conspiracy to violate the Act could be established by circumstantial proof that he agreed to a scheme 'in which it was known that the likelihood of illegal interstate transportation was great.'

"At Teitelbaum's request, the jury was instructed in accordance with the *Twitchell* formulation, in a manner that completely satisfied his definition of the elements of the present offenses; and we are satisfied that the evidence was sufficient to justify the jury's conclusion that the proof of his guilt met the *Twitchell* standard."

In Footnote 22, appearing on Page 893 of the *Roselli* opinion, the *Twitchell* formulation is set forth as follows:

"'We think that, in a case of this kind, the evidence must show in relation to Twitchell that either:

"'1. he *directly* agreed to the illegal interstate transportation, or *directly* agreed to a scheme which could not be consummated without illegal interstate transportation, or *directly* agreed to a scheme in which it was known that the likelihood of illegal interstate transportation was *great* (it being understood that such agreement need not be overt, and may be inferred from circumstantial evidence; and that directness refers not to face-to-face dealings, but to the extent of his knowledge of the purpose and scope of the conspiracy); *or*

> "'2. he evidenced his indirect agreement by substantial participation in the scheme *with actual knowledge* of the proposed or completed, illegal interstate transportation.' 313 F.2d at 429."

Although the petitioner did not object to the trial court's failure to properly instruct the jury as to all of the essential elements of the conspiracy charged in the indictment, this failure can be raised for the first time in the reviewing court. See *Screws* v. *United States,* (1945) 325 U.S. 91, 65 S. Ct. 1031, 1038:

> "It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. See Johnson v. United States, 318 U.S. 189, 200, 63 S. Ct. 549, 555, 87 L. Ed. 704. But there are exceptions to that rule. United States v. Atkinson, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555; Clyatt v. United States, 197 U.S. 207, 221, 222, 25 S. Ct. 429, 432, 433, 49 LEd. 726. And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

The responsibility of instructing the jury upon the essential elements of a crime rests upon the court, and the failure to meet this special responsibility of the court itself need not be overlooked by an appellate court because overlooked by counsel. See *Barry* v. *United States,* (D.C. Cir. 1961) 287 F. 2d 340, 341. Accord: *United States* v. *Harris,* (4th Cir. 1965) 346 F. 2d 182, 184; *United States* v. *Hutchinson,* (4th Cir. 1964) 338 F. 2d 991; *Byrd* v.

United States, (D.C. Cir. 1965) 342 F. 2d 939, 940-942; *Mason* v. *United States,* (10th Cir. 1967) 383 F. 2d 107. 110.

2. WHERE THE PETITIONER WAS CHARGED ONLY AS AN AIDER AND ABETTOR, THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT THE CO-DEFENDANTS, INCLUDING THE ONE CHARGED AS A PRINCIPAL, WERE HIS ACCOMPLICES AS A MATTER OF LAW.

Counts Two Through Eight of the indictment charged the petitioner along with the defendants, Wright and Coleman, with the offense of "wilfully and knowingly aid and abet, counsel, induce and procure the above and foregoing offense (violation of Title 18, United States Code, Section 2314)" relating to seven specific Apex Smelting Company checks. The defendant Nagel was charged with a violation of Title 18, United States Code, Section 2314 as the principal in each of these counts. However, these counts of the indictment as to Nagel were dismissed at the time of his sentencing (A. 12).

Among the instructions given by the court were:

> "An accomplice is one who voluntarily participates in the commission and planning of a crime. The witnesses George Wright, Ionia Coleman and Dayo D. Nagel are accomplices of the accused in this case. As accomplices, their testimony must be closely examined and weighed with great care." (A. 53)
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> • • • •
>
> "Whoever aids, abets, counsels, commands, induces or procures the commission of a crime is punishable as a principal. In order to aid or abet the commission of a crime, a person must associate himself with the criminal venture, participate in it and try to make it succeed." (A. 61)

In rejecting the petitioner's contention that the accomplice instruction as given was error, the court below stated that under the circumstances of the case the error was harmless and that the instruction was to the benefit of the petitioner. While it may be true that under certain situations the giving of an accomplice instruction might well be to a defendant's benefit; however, under the circumstances of this case and in the manner that the instruction was given, whatever beneficial effects the instruction might have had were far outweighed by the prejudicial effects of the instruction. In the case at bar the petitioner was not charged as a principal, but merely as an aider and abettor, and, therefore, an instruction which advises the jury that certain other defendants, including the alleged principal, whom an accused is charged to have aided and abetted are accomplices of his as a matter of law, cannot be said to be to his benefit. The contrary is true and the instruction under these circumstances could have had only a detrimental effect upon the petitioner in the eyes of the jury in that this instruction, in effect, told the jury that the petitioner was guilty as charged.

The mere fact that an erroneous instruction might be favorable to a defendant does not justify its giving in the event the defendant is also prejudiced thereby. See *Michaud* v. *United States,* (10th Cir. 1965) 350 F. 2d 131.

In all of the cases cited by the Seventh Circuit in support of its position, it must be kept in mind that in those cases the defendant was charged as a principal and not as an "aider and abettor". As applied in the case at bar, the terms "accomplice" and a person who "aids and abetts" the commission of a crime are synonomous. See

Black's Law Dictionary, 3rd Edition, 1933, which defines accomplice as: "One who is in some way concerned or associated in commission of crime; partaker of guilt; one who aids or assists, or is an accessory. *McLendon* v. *United States,* (C.C.A. Mo.) 19 F. 2d 465."

The instruction as given in the case at bar had the effect of directing the jury that the crimes charged in the indictment had been, in fact, proved and also that the testimony of the other defendant witnesses was credible and thus this petitioner's opportunity to have his guilt or innocence decided by the jury, as guaranteed by the Sixth Amendment to the Constitution, was effectively and prejudicially emasculated inasmuch as the court was in effect telling the jury that it should convict the petitioner.

In *Bollenbach* v. *United States,* (1946) 326 U.S. 607 66 S. Ct. 402, this court stated:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal. The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court by the jury's function of measuring the evidence by appropriate legal yardsticks.
>
> * * * *
>
> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was

implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts." 326 U.S. at pages 613-614.

In the case of *Roe* v. *United States,* (5th Cir. 1961) 287 F.2d 435, the court stated at Page 440:

> "That means that the trier of the fact, here a jury, must determine the issue. More than that, this being a criminal case in contrast to the more common injunction proceeding or damage suit under the Act, two principles inescapably apply. First, in Mr. Justice Jackson's words 'in a civil action * * * a preponderance of the evidence will establish the case; * * * in a criminal case, [the evidence must] meet the stricter requirement of satisfying the jury beyond a reasonable doubt.'"

In *Mims* v. *United States,* (5th Cir. 1967) 373 F.2d 135, the court stated at Pages 147-148:

> "In this case the court instructed the jury that they need not spend any time debating as to whether or not an attempt was made to rob the bank, as the evidence showed such attempt as a matter of law. Counsel for the appellant did not object to that instruction, even though he had indicated in his opening statement at the beginning of the trial that the charge contained in count one would be contested not only on the ground of insanity, but also on the ground 'that there was never a valid attempt, an actual attempt to commit the crime as alleged in Count One.' The instruction was so peremptory in nature that the error must be noticed without an objection having been made."

The decision of the court below is also in conflict with some of its earlier decisions. In *United States* v. *Balodimas*, (7th Cir. 1949) 177 F.2d 485, the trial judge, in giving an instruction relating to the credibility of an accomplice's testimony, told the jury: "The witnesses Tula Kokonas and Dianne Rontos, who have testified in this case, have openly admitted the part that they had in the commission of crime. *They may be deemed accomplices in this case . . .*" (Emphasis Added) In reversing the defendant's conviction, the Seventh Circuit held:

> "In our view, they were not accomplices either as a matter of law or of fact as that term is used in criminal law. *Even if the record furnished any basis for the contention that they were accomplices,* and we think it does not, *it was a question for the jury and not the court.*" (Emphasis Added) 177 F.2d at page 487.

In *United States* v. *Fellabaum*, (7th Cir. 1969) 408 F.2d 220, the Seventh Circuit agreed that the giving of such as instruction was error but that it was harmless error. However, inasmuch as the petitioner in the instant cause was charged merely as an aider and abettor, the giving of such an instruction cannot be said to be harmless.

See *1 Devitt & Blackmar Fed. Jury Instr. 2d Ed.*, Sec. 1204, Page 257, wherein it is stated:

> "The instruction should (sic) refer to 'alleged accomplice' rather than simply 'accomplice' since, by its definition of the word, the court might be accused of pre-judging the guilt of defendant under the original instruction. See Moore v. United States, 356 F.2d 39, 43 n. 2 (5th Cir. 1966). Cf.: Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 1019, on remand 417 S.W.2d 278 (Tex. Cr.App. 1967); United States v. Johnson, 343 F.2d 5, 6 (2d Cir. 1965)."

The instruction advising the jury that the defendant Nagel was an accomplice of the petitioner was also misleading and confusing for the reason that Nagel was not convicted of the substantive counts (Counts Two through Eight) of the indictment. Nagel entered a plea of nolo contendre only as to Count One (the conspiracy count) of the indictment and the remaining counts were dismissed as to him, and therefore, the court was also instructing the jury that Nagel was also guilty of these counts despite the fact that there was not sufficient evidence in the record to sustain this direction. The petitioner was therefore convicted of aiding and abetting an individual who had not been convicted as a principal. This is in conflict with a recent Seventh Circuit case entitled *United States* v. *Stevison,* (7th Cir. 1973) 471 F.2d 143, which stated that a person charged as an aider and abettor may not be convicted absent conviction of the person charged as a principal.

Only recently this Court had occasion to reverse a Seventh Circuit decision upholding the giving of an accomplice instruction. In that case, *Cool* v. *United States,* (1972) 93 S.Ct. 354, this Court stated that the giving of the accomplice instruction under the existing circumstances was tantamount to a requirement that the defendant must establish his innocence beyond a reasonable doubt.

In the case at bar the court's instruction to the effect that the petitioner and co-defendants, including the one charged as a principal, were accomplices as a matter of law had the effect of shifting to the petitioner the burden of establishing his innocence beyond a reasonable doubt.

3. THE PETITIONER WAS PENALIZED FOR EXERCISING HIS CONSTITUTIONAL RIGHT TO A TRIAL BY JURY. HIS SENTENCE CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT IN VIEW OF THE FACT THAT HIS CO-DEFENDANTS WERE PLACED ON PROBATION.

The defendants who chose not to stand trial in the instant cause were placed on probation for a period of three years (T.S. 4, 8, 11 and 12). The defendant, Wright, received probation notwithstanding the fact that he had two prior felony convictions for burglary. Only the petitioner received a jail sentence even though he had no prior criminal record whatsoever.

Therefore, it is obvious that the petitioner was unduly and severely punished merely because of the fact that he chose to exercise his right to a trial by jury as guaranteed to him by the Sixth Amendment to the Constitution. Considering the facts and circumstances of the case, there can be no other rational basis for the disparity in sentencing.

Recent decisions of the various Courts of Appeal show that they have the power to set aside or reduce the severity of a sentence as an exercise of their supervisory power of the administration of justice in the lower federal courts.

In the case of *United States* v. *West Coast News Company*, (6th Cir. 1966) 357 F.2d 855, 864-865, the Court of Appeals remanded the defendants' case for reconsideration of their sentences and stated that less severe sentences would have been a more discrete exercise of the District Judge's authority.

The court below has also on occasion reviewed the disparity of a defendant's sentence. See *United States*

v. *Wiley*, (7th Cir. 1959) 267 F.2d 453, wherein this court stated at page 456:

> "'* * * While the severity of the sentence imposed on the defendant is irrelevant in deciding this appeal, we must point out the disparity between the sentence imposed by the court on Wiley, an *accessory*, and McGhee, *the principal*, driver of the truck and the most active participant in the crime. According to the uncontradicted statement of the government attorney, appearing in the record, McGhee had four prior felony convictions, was the ringleader in this matter, and, subsequent to this offense and while out on bond, committed two other similar offenses. Yet he was sentenced to prison for *two* years, while defendant Wiley, who had no prior criminal record, was sentenced to prison for *three* years.'"

In the other case of *United States* v. *Wiley*, (7th Cir. 1960) 278 F.2d 500, this court stated at page 504:

> "Our part in the administration of federal justice requires that we reject the theory that a person may be punished because in good faith he defends himself when charged with a crime, even though his effort proves unsuccessful. *It is evident that the punishment imposed by the district court on Wiley was in part for the fact that he had availed himself of his right to a trial, and only in part for the crime for which he was indicted.*
>
> "For these reasons we set aside the three years' sentence imposed and reimposed by the district court on Wiley and we remand this case to that court for a proper sentence not inconsistent with the views herein expressed." (Emphasis Added)

See also *United States* v. *Moody*, (6th Cir. 1967) 371 F.2d 688 wherein the defendant's case was remanded for reconsideration of sentence and the court stated that

in absence of a prior felony record, a maximum five year concurrent sentence was excessive, and sentences totaling less than half of the sentence actually imposed would satisfy federal interest in violation of tax laws.

The ruling of the court below is also in conflict with the American Bar Association's Minimum Standards for Criminal Justice Relating to Sentencing Alternatives and Procedures, Section 2.3(c) which provides:

> "A sentence not involving confinement should be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary."

It is also in conflict with Section 1.3 of the American Bar Association's Standards Relating to Probation, which provides:

> "Criteria for granting probation:
>
> (a) The probation decision should not turn upon generalizations about types of offenses or the existences of a prior criminal record, but should be rooted in the facts and circumstances of each case. The court should consider the nature and circumstances of the crime, the history and character of the offender, and available institutional and community resources. Probation should be the sentence unless the sentencing court finds that:
>
> (i) confinement is necessary to protect the public from further criminal activity by the offender; or
>
> (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
>
> (iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed.

(b) Whether the defendant pleads guilty, pleads not guilty or intends to appeal is not relevant to the issue of whether probation is an appropriate sentence."

The petitioner met all of the criteria for probation as enunciated in the American Bar Association's Standards Relating to Probation. Since the other defendants were placed on probation, it is clear that the petitioner received a jail sentence solely because he elected to stand trial; and therefore, under such circumstances as these, his sentence was violative of his rights pursuant to the Eighth Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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Chicago, Illinois 60603
Attorney for Petitioner.

APPENDIX

In The
United States Court of Appeals
For The Seventh Circuit

No. 72-1138

United States of America,
Plaintiff-Appellee,

v.

Waverly Thompson,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 CR 509
Alexander J. Napoli, *Judge.*

Argued: October 30, 1972 — Decided: March 8, 1973

Before Knoch, *Senior Circuit Judge,* and Cummings and Pell, *Circuit Judges.*

Knoch, *Senior Circuit Judge.* Defendant-Appellant, Waverly Thompson, has taken this appeal from his conviction in a jury trial on an indictment which charged, in one count, that he and three co-defendants had conspired, in violation of Title 18 U.S.C. §371, to transport forged securities in interstate commerce and, in seven other counts, that one co-defendant, Dayo Nagel, had committed substantive violations, aided and abetted by this defendant and co-defendants George Wright and Ionia Coleman, in violation of Title 18 U.S.C. §§2 and 2314. Defendant was sentenced to serve five years on each count, to run concurrently.

The conspiracy alleged included a program entailing theft of eight blank checks of the Apex Smelting Company by Ionia Coleman, an employee of Apex, who was to give these checks to her brother, George Wright, who, in turn, would give them to defendant, Waverly Thompson. These checks were to be forged and falsely completed to appear to be checks issued by Apex. George Wright and defendant would cause the checks to be sent to Dayo Nagel, in North Dakota, who would negotiate them. These checks would return to Chicago from Bismarck, North Dakota, in interstate commerce. Dayo Nagel was to divide the proceeds with the other defendants. A part of the alleged conspiracy was concealment of the purpose of and the acts done in furtherance thereof. Co-defendants George Wright and Ionia Coleman pleaded guilty to all counts and co-defendant Dayo Nagel pleaded nolo contendere to Count One. All three testified at the trial of this defendant.

Mrs. Coleman testified that she told her brother George Wright about the lax security at Apex and the ease of acquiring Apex checks and that she said she could cover thefts at the time she reconciled the Apex bank statements. On December 12, 1970, a Saturday, she did in fact steal about eight blank checks with copies of authorized signatures and stickers for the envelopes. Her brother told her that defendant had said the name on the checks would be Nagel Grain and Seed Company.

George Wright testified that defendant spoke of having an outlet and asked him whether he could acquire checks, whereupon George Wright told defendant about his sister and it was agreed that defendant's source "in the north" would get one-half of the proceeds with one-fourth going to Mrs. Coleman and the last quarter split between defendant and Mr. Wright.

Dayo Nagel testified that he had a conversation in Chicago late in November or early in December 1970, in the course of which defendant said he "had some things going" and could probably assist Mr. Nagel who needed

between $30,000 and $35,000 for his feed business in North Dakota. On or about December 10, 1970, Mr. Nagel received a telephone call from defendant who spoke about a check and thought he might have something to send Mr. Nagel.

The following Sunday, evidently December 13, 1970, defendant again telephoned Mr. Nagel, told him to return $10,000 of the proceeds of a $20,000 check being sent him. Mr. Nagel received an Apex check for $20,000 payable to his company on December 16, 1970, which he deposited in his company's account at the Dakota National Bank in Bismarck, North Dakota.

This check was apparently the check to which Mr Wright referred when he testified that he received a blank Apex check, together with a canceled Apex check and stickers from his sister which he took with him when he visited defendant, with whom he agreed to make out the check for $20,000. On instructions of defendant, Mr. Wright said he typed the check as payable to "Nagel's Grain and Feed Company in Bismarck, North Dakota," and forged the signature. The two men drove to a post office and Mr. Wright mailed the check. Also at defendant's request, Mr. Wright drove to North Dakota in an automobile rented by defendant to pick up $10,000.

The same day, December 18, 1970, Mr. Nagel received telephoned instructions from defendant to deliver $10,000 in cash to defendant's messenger. He made that delivery. He also mailed a check for $2,500 directly to defendant which came back canceled, bearing endorsement in defendant's name.

Defendant met Mr. Wright at the latter's home in Chicago and indicated dissatisfaction with the $1,300 he had received as his share. When, a few days later, Mr. Wright brought defendant the seven remaining blank Apex checks, already filled out and forged, defendant said other arrangements had been made and he would call Mr. Wright when the funds were received. However, no more money came to Mr. Wright.

Mr. Nagel received and deposited another Apex check payable to Nagel Grain and Feed Company in the amount of $25,000 on December 22, 1970. In a telephone conversation on December 28, 1970, defendant asked him to take only one-third of the proceeds of these checks which in future would be handled by them alone.

Accordingly, Mr. Nagel withdrew $17,000 from his account, $16,700 of which he delivered to defendant in Chicago, in return receiving five more Apex checks in amounts of $16,000 to $25,000. He deposited a $25,000 check on December 30, 1970, an $18,000 check on January 4, 1971 and three checks totaling $60,639 on January 5, 1971, in another bank, Farmers and Merchants Bank of Sheyenne, North Dakota.

Meanwhile Mrs. Coleman's job had changed and she was no longer in a position to handle the checks returned from the bank. She told her brother early in January 1971 and he told defendant who said that nothing could now be done about that.

On January 11, 1971, Mr. Nagel was arrested on a State charge of intent to defraud the Dakota National Bank of Bismarck. When Mr. Nagel was released on bond, he came to Chicago where he met with defendant and Mr. Wright who testified to a conversation wherein Mr. Nagel said he delivered between $27,000 and $29,000 which he wanted back to deposit in his own account. Mr. Wright had denied all knowledge of this money. Mr. Nagel also testified that in this conversation Mr. Wright had denied receiving his share of the $17,000.

Defendant contends that the Court failed fully to instruct the jury on the essential elements of the conspiracy charged in the indictment. Defendant sees one such vital element as knowledge relating to the interstate character of the securities. The instruction with which defendant finds fault read:

> Count 1 of the indictment No. 71 CR 509 charges the crime of conspiracy to commit the offense of

transporting into interstate commerce falsely made and forged securities, knowing the securities to have been falsely made and forged.

To convict the defendant Waverly Thompson of this offense, the government must prove beyond a reasonable doubt the existence of a conspiracy to commit the offense of transporting into interstate commerce falsely made and forged securities, knowing the securities to have been falsely made and forged.

Defendant's interpretation of this instruction strikes us as somewhat strained but we have considered it with great care. Defendant argues that this instruction allowed a conviction on the finding that defendant knew only that the securities were falsely made and forged. Although no objection was stated at the time, defendant asserts a right to raise this point on appeal on the ground that the alleged error is so fundamental, touching the Trial Court's responsibility for instructing the jury upon the essential elements of the offense on which defendant was being tried. Defendant cites *Screws* v. *United States*, 1945, 325 U.S. 91, 107 and other cases to support his raising objection to the instruction at this late date.

In urging that we consider knowledge of interstate transportation to be an essential ingredient of the offense, defendant cites a number of Second Circuit decisions including *United States* v. *Giuliano*, 1965, 348 F.2d 217, 221; *United States* v. *Vilhotti*, 1971, 452 F.2d 1186, 1189, 1190 (where the Court drew a distinction between the substantive offense for which knowledge of interstate commerce need not be charged and conspiracy to commit the offense.) The Court quothe Judge Learned Hand in *United States* v. *Crimmins*, 2 Cir., 1941, 123 F.2d 271, 273, that one may drive past a traffic light of whose existence he is ignorant, but not conpire to drive past a light unless one knows it is there. We do not find this line of reasoning particularly apt with respect to the statutes here involved.

Defendant also cites *United States* v. *Bollenbach*, 1945, 147 F.2d 199, 201, rvsd. 1946, 326 U.S. 607, 609. The erroneous charge in that case read:

> . . . possession of stolen property in another state than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce. . . .

We are not here dealing with presumptions.

The Second Circuit position is again stated in the recent case of *United States* v. *Fields*, 1972, 466 F.2d 119, 121, which defendant has brought to our attention as additional authority.

The Ninth Circuit, however, holds to the contrary. In *United States* v. *Roselli*, 1970, 432 F.2d 879, 890-91, *cert. den.* 1971, 401 U.S. 924, the Court expressly held that knowing use of interstate facilities was not an essential element of either the substantive offense or the conspiracy to violate §2314. The Ninth Circuit found nothing in the legislative history indicating a purpose to limit the statute to violators who specifically intended to utilize interstate facilities and felt that the natural import of the statute's wording was to the contrary, that §2314 was aimed at the evils of theft, fraud and counterfeiting and that suppression of movement of the fruits of these crimes was the means not so much of regulating interstate commerce as of suppressing the crimes within a constitutional exercise of federal power.

We find extremely persuasive the reasoning of the Ninth Circuit (at page 892) that proof of knowledge of the federal jurisdictional element is not required for conviction of the offense. As an example, the Court uses the first paragraph of §2314, which requires as a jurisdictional element of the offense that the value of the securities exceed $5,000, and points out that it would be no defense that the accused mistakenly thought the securities were worth only $2,000.

This Court affirmed the convictions of violating §1951 (the Hobbs Act) where it was contended that the evidence was insufficient in that it failed to show defendant's intention or even knowledge that interstate commerce would be affected by the conspiracy. *United States* v. *Battaglia*, 7 Cir., 1968, 394 F.2d 304, 312, vacated and remanded on other grounds, *sub nom. Giordano* v. *United States*, 1969, 394 U.S. 310 (ultimately affirmed again 432 F.2d 1115, *cert. den.* 401 U.S. 924) where Judge Cummings cited with approval this Court's earlier decision in *United States* v. *Pranno*, 1967, 385 F.2d 387, *cert. den.* 390 U.S. 944, that it was necessary only to prove that defendants conspired to commit extortion and that the natural effect of carrying out their threat, whether they were conscious of it or not, would affect commerce.

We affirmed the conviction in *United States* v. *Cerone*, 1971, 452 F.2d 274, *cert. den.* 405 U.S. 964, in the face of a similar challenge respecting Title 18 U.S.C. §1952, use of interstate facilities to further unlawful gambling, on the ground that ample proof had been adduced of defendant's knowledge that interstate facilities would be used. In *Cerone*, we expressly reserved the decision whether to adopt the Ninth Circuit view. We need not make that decision in this case either. We fully agree with the government that use of interstate facilities under the particular facts of this case was so vital a factor in the defendants' scheme that if the jury did not believe defendant was aware of that fact, the jury could not possibly have found him guilty. Even assuming that defendant's interpretation of the instruction is correct, it could not have led the jury into believing that it could convict this defendant, in the circumstances of this case, without deciding that he was well aware of the necessary use of interstate facilities.

Defendant sees prejudicial results from the Trial Judge's instruction to weigh with great care the testimony of accomplices, wherein he told the jury that George Wright, Ionia Coleman and Dayo Nagel were accomplices;

thus, defendant contends, the Court virtually directed a verdict of guilty instead of allowing the jury to decide whether defendant was an aider and abettor of those three as charged in the indictment.

We agree that the better description of the three witnesses would have been as "alleged accomplices," but, as in *United States* v. *Fellabaum*, 7 Cir., 1969, 408 F.2d 220, 227, *cert. den. sub nom. Pyne* v. *United States*, 396 U.S. 818, and *United States* v. *Pritchard*, 7 Cir., 1972, 458 F.2d 1036, 1040, *cert. den.* 407 U.S. 911, we find this instruction harmless error in the circumstances of this case. The jury cannot have failed to discern that the purpose of the instruction was to alert it to the need for caution in weighing the testimony, all to the benefit of the defendant.

As the government notes, this was not a weak case. In addition to the testimony of the three named witnesses, there was a stipulation that defendant had deposited in his own account a check drawn on Dakota National Bank, signed "Nagel Grain and Seed Company, Dayo D. Nagel," and that calls were placed between October 9, 1970 and February 3, 1971, to telephones registered to Dayo Nagel and the Bismarck Motor Hotel from a telephone registered to defendant. The various canceled checks and their endorsements were put in evidence. A contract for rental of an automobile signed December 17, 1970, imprinted with a credit card number registered to defendant, showed mileage which also served to substantiate some of the testimony of Messrs. Nagel and Wright.

In *United States* v. *Balodimas*, 7 Cir., 1949, 177 F.2d 485, 487, on which defendant relies, the alleged accomplices were neither co-defendants nor unindicted co-conspirators. The judgment was reversed because this Court found "not justified by the record" the Trial Judge's instruction to the jury that the witnesses had openly admitted being violators and taking part in the commission of the crime.

Defendant sees as error the admission of statements which he characterizes as "post-conspiracy declarations of other co-defendants." Both George Wright and Dayo Nagel testified to a conversation which one placed late in January 1971 and the other early in February 1971. Mr. Nagel had been arrested, as indicated, on a State charge which he described as "with intent to defraud the Dakota National Bank of Bismarck" which apparently grew out of an insufficiency of funds in the Apex account to cover the forged Apex checks. He had come to Chicago in an attempt to secure funds to exonerate himself on the State charge after defendant had promised to help him. We cannot agree that Mr. Nagel's arrest on the State charge terminated the conspiracy charged in the federal indictment.

Mr. Wright testified, over objection of defendant, that at the conversation in question, Mr. Nagel explained that if he could recover the $27,000 to $29,000 he had previously delivered he could put it back into his account, and Mr. Wright had denied all knowledge of that sum. Mr. Nagel himself testified, also over objection, that George Wright said he had not received his share of the $17,000. As indicated, there had been earlier testimony that $10,000 had been delivered to Mr. Wright in Bismarck. Mr. Nagel had replied that he was not interested in that, but that he wanted the money back. Thus each of these witnesses testified to the fact of his own statement, as well as to the statement of the other, and both were present in court and available for cross-examination. These statements were thus mere repetition of earlier testimony that Mr. Nagel gave Mr. Wright $10,000 and defendant $16,700. We fail to see any prejudicial effect. The statements, in our opinion, concerned events occurring clearly within the course of the conspiracy.

In defendant's view, his sentence was unduly harsh. He compares it with the lenience shown his co-defendants who were all granted probation for three years, with Counts 2 to 8 of the indictment being dismissed as to Dayo Nagel. He notes that George Wright had a record

of two prior convictions for burglary. Defendant sees only one possible explanation: that he has been penalized for exercising his Constitutional right to trial by jury.

The record discloses that defendant was formerly a policeman in Chicago. The Trial Judge specifically indicated that defendant seemed to have secured most of the money from this operation. The testimony shows that defendant was the principal director of the actions taken. It was he who established the outlet for the checks. He supplied the name and address of the payee. He showed George Wright how to make out the checks. He directed him to go to North Dakota, made the arrangements for the car and issued the telephone instructions to Mr. Nagel in North Dakota. He did secure most of the spoils and did so at the expense of his fellow conspirators contrary to their original agreement.

Defendant was convicted of violations of Title 18 U.S.C. §§371 and 2314. The maximum imprisonment under §371 is five years and under §2314, ten years. A sentence of five years on each count to run concurrently is well within the limits of the statute.

A show of lenience to those who exhibit contrition by admitting guilt does not carry a corollary that the Judge indulges a policy of penalizing those who elect to stand trial. *United States* v. *Lehman*, 7 Cir., 172, 468 F.2d 93, 110.

The Judgment of the District Court is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
April 9, 1973

Before
Hon. WIN G. KNOCH, *Sr. Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

No. 72-1138
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WAVERLY THOMPSON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(71 CR 509)

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1498

WAVERLY THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner renews his contentions, rejected below, that the instructions of the district court were improper because they allegedly failed to require proof that he knew of the interstate transportation of the forged securities, and because they described petitioner's co-defendants as "accomplices" instead of "alleged accomplices." Petitioner also claims that his five-year sentence penalized him for exercising his right to trial by jury and constituted cruel and unusual punishment.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiracy to transport forged securities in interstate commerce and of seven counts of aiding and abetting the commission of the substantive crime, in violation of 18 U.S.C. 2, 371, and 2314. He was

sentenced to concurrent five-year terms of imprisonment. The court of appeals affirmed (Pet. App. 1a-10a).

Each of petitioner's contentions was thoroughly considered and properly rejected by the court of appeals (Pet. App. 4a-10a), on whose opinion we rely in urging that the petition for a writ of certiorari should be denied. As that opinion makes clear, there is no need to reach the question whether under the statutes here petitioner had to have knowledge of the use of interstate commerce, because the instruction actually given "could not have led the jury into believing that it could convict this defendant, in the circumstances of this case, without deciding that he was well aware of the necessary use of interstate facilities" (Pet. App. 7a). The sentence, well within maximum limits, cannot fairly be termed illegal or cruel on any theory (see Pet. App. 9a-10a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

DOJ-1973-06